

Exhibit 63

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 HERMÈS INTERNATIONAL, et al.,
4 Plaintiffs,

5 v. 22 Civ. 384 (JSR)

6 MASON ROTHSCHILD,
7 Defendant. Trial

8 -----x
9 New York, N.Y.
February 6, 2023
10 9:30 a.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge
-and a Jury-

14
15 APPEARANCES

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25

(Jury present)

DAVID THOMAS NEAL, resumed.

THE COURT: Good morning, ladies and gentlemen.

Welcome back. I hope you had a good weekend, but now we have work to do.

I should mention that, through no fault of his own in any respect, Mr. Rothschild is delayed this morning. He will be with us later, but counsel have agreed we can proceed even in his absence.

So, counsel.

DIRECT EXAMINATION (Continued)

BY MR. MILLSAPS:

Q. Good morning, Dr. Neal.

A. Good morning.

Q. When we left off on Friday afternoon, we had just gone through an overview of your background and credentials. Do you recall testifying that you have published 26 peer-reviewed papers?

A. Yes, I do.

Q. Have you also acted as a scientific peer reviewer for other peoples' articles?

A. I have. In fact, I was a peer reviewer on many journals in psychology and consumer behavior.

Q. Has your previous work as an expert witness involved the design and implementation of surveys to assess whether there is

1 a likelihood of confusion between two trademarks?

2 A. Yes. I have done that many times. A rough estimate would
3 be 60 to 90 different surveys of that kind specifically.

4 Q. And the jury heard Dr. Isaacson talk about his use of the
5 *Eveready* method for testing likelihood of confusion. Have you
6 used that specific method in conduct surveys before?

7 A. I have. That's a common method, and I've probably used it
8 50 times I would say.

9 Q. Before we get into the details of what you have to say,
10 have you heard of Dr. Isaacson before this case?

11 A. I had. We actually worked on the same side of a case a
12 couple of years ago. So I was aware of him from that prior
13 case.

14 Q. And on Friday afternoon, did Dr. Isaacson approach you here
15 in the courthouse?

16 A. He did, yes. I think just to say hello, since we had never
17 met in person before, despite having worked on that case.

18 Q. Now, you testified on Friday about your assignment in this
19 case. But would you just remind us of what your goals were.

20 A. Sure. Pretty simple. To conduct a scientific review of
21 the two surveys that Dr. Isaacson did, and in particular to
22 look at his conclusion from the first survey, the one of the
23 NFT purchases, where he concluded that there was a likelihood
24 of confusion. I looked very closely at that confusion to work
25 out if it was accurate or not.

1 Q. Did you prepare some slides for your presentation today?

2 A. I did.

3 MR. MILLSAPS: Ashley, would you please put up the
4 first slide here.

5 BY MR. MILLSAPS:

6 Q. Dr. Neal, could you explain your methodology for evaluating
7 Dr. Isaacson's surveys?

8 A. Certainly. This is pretty similar to the process you go
9 through in any scientific technical review of someone else's
10 work. You begin by very carefully going through the
11 questionnaires themselves kind of line by line looking for any
12 biases or ambiguous language or any design flaws.

13 The second thing you do is you actually go into the
14 raw data. So basically every single person's answer to every
15 single question, you look at that, and you reanalyze the data
16 to see if the person who analyzed it initially, so
17 Dr. Isaacson, did it correctly.

18 And then the final thing is you write up whatever you
19 find in a formal report.

20 MR. MILLSAPS: And Ashley could we go to the next
21 slide.

22 BY MR. MILLSAPS:

23 Q. At a high level, Dr. Neal, how would you summarize your
24 conclusions about Dr. Isaacson's surveys.

25 A. Sure. Perhaps the most important one thing is that NFT

1 say after me, that is a separate and independent reason for you
2 to find in favor of Mr. Rothschild on all of Hermès' claims.

3 When we're done speaking with you, Judge Rakoff is
4 going to give you the set of instructions that I have been
5 referencing, and he'll explain to the law to you and your job
6 when you go back into the jury room to deliberate about all of
7 the evidence that you have seen over the last week.

8 Judge Rakoff is going to instruct you that
9 Mr. Rothschild's MetaBirkins are, at least in some respects,
10 works of artistic expression and so they are protected by the
11 First Amendment, unless Hermès can clear a very high bar in
12 this case. Judge Rakoff will instruct you that the First
13 Amendment bars liability on all of Hermès' claims unless Hermès
14 has proved, again, unless Hermès has proved that
15 Mr. Rothschild's use of the Birkin mark was not just likely to
16 confuse potential consumers, but was intentionally designed to
17 mislead potential consumers into believing that Hermès was
18 associated with Mr. Rothschild's MetaBirkins project. I'm
19 sorry. It is a mouthful, and I am just reading it.

20 If anything is clear from the evidence that you have
21 seen and the testimony that you have heard, it's that
22 Mr. Rothschild had no intention to mislead anyone into
23 believing that MetaBirkins came from Hermès. He made clear
24 that he was the creator everywhere he could because he wanted
25 the credit for his own artwork. You saw him testify. He was

1 proud of it.

2 Ashley, would you please put up Mr. Martin's
3 testimony.

4 You heard Hermès' representative, Mr. Martin, testify
5 that he has no evidence that Mr. Rothschild ever told anyone
6 that MetaBirkins came from Hermès.

7 Ashley, would you please show the MetaBirkins website.

8 You have seen that Mr. Rothschild identified himself
9 as the creator of MetaBirkins on the MetaBirkins website. And
10 when Hermès sent him a cease and desist letter, he even put up
11 a disclaimer on the website to make clear, doubly clear that
12 Hermès was not affiliated with MetaBirkins.

13 Ashley, would you please show the MetaBirkins
14 Instagram page.

15 Mr. Rothschild identified himself on the MetaBirkins
16 social media pages like the MetaBirkins Instagram pages that
17 you see here.

18 Ashley, would you please show the MetaBirkins Rarible
19 page.

20 Mr. Rothschild also identified himself on auction
21 platforms where he was able to, like he did here on Rarible.
22 You can see it says, A digital art project by Mason Rothschild
23 living on the Ethereum blockchain.

24 Mr. Rothschild identified himself in media interviews
25 as the artist who created MetaBirkins.

Ashley, would you please play the Yahoo Finance clip.

(Video played)

MR. MILLSAPS: You saw that Mr. Rothschild ran a public channel on the Discord platform where he constantly interacted with his MetaBirkins audience. Mr. Rothschild made clear in this public Discord channel --

And, Ashley, could you put up the first.

-- he made clear in the public Discord channel that he was the one behind MetaBirkins. You can see here, when he posted on December 22, 2021: No, like every disclaimer says, this is an art project and not associated with Hermès.

And everyone in that channel, as you heard, was able to message him directly at any time. He was in constant communication with these people.

Ashley, would you go to the next Discord slide.

You saw that that he ran polls of his MetaBirkins members to ask them what they wanted him to do next with his MetaBirkins art project.

And you also heard from Mr. Rothschild that when he became aware of articles, he or his publicist, Ken Loo, became aware of articles that mistakenly attributed MetaBirkins to Hermès, they reached out to correct them.

Ashley, would you show that bit of Mr. Rothschild's testimony.

I want you to just ask yourself, why would

1 Mr. Rothschild have wanted to mislead people into thinking that
2 MetaBirkins came from Hermès?

3 It would be so he could make as much money as he
4 possibly could off of the sales of them, right?

5 But we know that he didn't do that.

6 He sold the MetaBirkins for just .1 ETH, the
7 equivalent of about \$450 at the time.

8 Now, as you heard, there was a lot of excitement about
9 the MetaBirkins NFTs when they were released. He'd been
10 building that excitement up by previewing them for weeks on
11 Discord on his social media pages on the website.

12 It's pretty clear that demand was high enough at that
13 point that he could have charged a lot more money than what he
14 did for those 100 MetaBirkins NFTs, but he didn't do that.

15 He didn't do that because that was part of his
16 artistic experiment, as you heard him explain, and as he
17 explained in the Yahoo Finance interview that you've seen clips
18 of, because he wanted to see what kind of value people would
19 ascribe to these two dimensional pictures of imaginary Birkin
20 bags once they were released out into the world.

21 Now, you have heard Mr. Warshavsky, my opposing
22 counsel, go on about the fact that MetaBirkins NFTs were
23 attached to the shrouded object for less than 24 hours when
24 they were being minted.

25 All right. I am not sure what he's getting at here.

1 If this were a case where the artworks were not previewed and
2 customers had no idea what they were buying, other than a
3 shrouded image called MetaBirkins, then maybe what he was
4 saying to you would be relevant.

5 But that's not what happened here.

6 Here, it is undisputed that Mr. Rothschild previewed
7 the MetaBirkins artworks before the NFTs were released.

8 Everybody who bought a MetaBirkins NFT knew that they
9 were going to get one of the 100 MetaBirkins artwork. This
10 wasn't a secret. Even Mr. Martin, Hermès representative,
11 admitted this in his testimony.

12 If anything is clear in this case, it is that
13 Mr. Rothschild never intentionally tried to mislead anyone into
14 believing that MetaBirkins came from Hermès. He wanted to
15 conduct an artistic experiment, and he wanted the credit for
16 his own artwork.

17 After I sit down, Mr. Harris is going to talk with you
18 in more detail about the evidence of confusion in this case.
19 What I will say about it now is that the evidence that
20 potential consumers were likely to be confused into thinking
21 that MetaBirkins came from Hermès is weak. You just heard
22 Dr. Neal testify about how weak it is. It doesn't come close
23 to clearing the high bar of the First Amendment.

24 Now, there will always be people who are confused
25 about things, whether in a survey that you are giving them or

1 on social media. But it is clear from Hermès' own survey
2 evidence that it is not exceptionally likely that potential
3 consumers, people who spend thousands of dollars on handbags or
4 NFTs, would be confused about whether MetaBirkins comes from
5 Hermès.

6 It is not surprising that the evidence of confusion is
7 so weak, because Mr. Rothschild, as you have seen, made clear
8 wherever he could that he created MetaBirkins. He is the
9 artist. He created them. And he's proud of it.

10 He has a constitutional right to create his
11 MetaBirkins artwork, he has a constitutional right to promote
12 them, and he has a constitutional right to sell and make money
13 from his MetaBirkins artwork, so long as he doesn't explicitly
14 mislead people into believing that it came from Hermès and not
15 him. That is the bottom line in this case.

16 But our Constitution doesn't enforce itself. Our
17 Constitution gives you, as members of this jury, the power to
18 enforce it. The rights that it guarantees, like the freedom of
19 speech and artistic expression that are protected by the First
20 Amendment, those rights are only guaranteed if we all uphold
21 them in moments like this.

22 I am confident that when you go back to the
23 deliberation room and you look at the totality of the evidence
24 in this case, you will see that the First Amendment bars
25 liability on all of Hermès' claims in this case.

1 Thank you so much for your time and attention.

2 I will turn this over to Mr. Harris now to discuss
3 with you confusion and Hermès' claims of dilution and
4 cybersquatting.

5 MR. HARRIS: Mr. Warshavsky, would you mind if I
6 borrowed one of those bags?

7 MR. WARSHAVSKY: Not at all.

8 MR. HARRIS: I will take the black one. Thank you.

9 MR. WARSHAVSKY: You got it.

10 MR. HARRIS: Good afternoon.

11 Let let's talk about confusion. This is a Birkin bag.
12 It takes 18 to 24 hours to make. It is a real handbag that can
13 hold real things.

14 This is Exhibit 506 in evidence. These are
15 MetaBirkins you can photocopy. They're two dimensional images.
16 You can cut one out and hold it up like this.

17 It is an art project. This is one of the MetaBirkins
18 that was not actually made. It is the one with the banana.
19 That's not a real banana. You can't eat it. You can't put it
20 in a MetaBirkin, and you can't even print it out 3D.

21 What you can do with a MetaBirkin, if you wish, is
22 print it out with your photocopier, put it in your pocket like
23 this, or you can look at it on your computer screen.

24 You heard Mr. Rothschild testify they are a 2D image.

25 Now, this is the example Mr. Rothschild used.

1 He took a water bottle. This is a 3D object. You can
2 take a 2D picture of it, you take a 2D picture of it, it's a 2D
3 image, and then you can photocopy it. That's what you can do
4 with a MetaBirkin. There is no confusion, and there's no
5 likelihood that a substantial number of consumers would be
6 confused.

7 (Continued on next page)

1 MR. HARRIS: Hermès spent a lot of money to hire three
2 expensive experts to come in here and testify. You heard from
3 Dr. Kominers. Smart fellow. Well paid, to say the least. But
4 you may find, you may find, that Dr. Kominers did not actually
5 say anything that matters to the claims in this case.

6 He had two main points.

7 The first had to do with segmenting the NFT mark.

8 Ashley, thank you.

9 And Dr. Kominers testified – my colleague tried to
10 draw this on the Elmo. Testified that the NFT market has
11 different submarkets: tickets, music, art only, digital brand,
12 other.

13 And if you go to the second slide, Dr. Kominers said
14 if you have an NFT that's attached to a painting, that's art
15 only. If you have an NFT that's attached to a painting and it
16 offers some more functionality, like the ability to get on a
17 list for a future project, now it's a digital brand.

18 Now, we don't disagree, no one here disagrees that
19 MetaBirkins offered an image plus certain other things, like
20 what I just said, the ability to get on a list for a future
21 project. Just don't know what that is relevant to. You can
22 buy a Timex watch for maybe \$20. It will tell the time. You
23 can buy a simple alarm, gets you up in the morning. Or you can
24 buy a Timex watch with an alarm. Those are both watches. Now,
25 perhaps Dr. Kominers would call the watch with the alarm not

1 watch only. Okay.

2 Dr. Kominers showed you a picture of an NFT frog.
3 That's the one over here on the left of the screen. We found
4 some other pictures of frogs on the internet. A frog with a
5 crown is still a frog, maybe not frog only.

6 So what Dr. Kominers does is argue that having utility
7 converts something into being a digital brand. The things that
8 doctor -- the things that Dr. Kominers identifies are the
9 things that artists have been doing for ages, which people have
10 testified to here: putting buyers on the list for future
11 projects, having a community, trying to promote their work and
12 promote the discussion.

13 Mr. Moulin, you may recall, one of Hermès's witness,
14 came in here to testify and brought a Power Point he created on
15 NFTs. This is one of the things he wrote. This is his slide:
16 NFTs allow for the establishment of a new more ethical and
17 decentralized relationship between owners of luxury items and
18 brands or between artists and their customers. Mr. Moulin flew
19 in from France for that. Or between item artists and their
20 customers.

21 So let's get back to Dr. Kominers. Dr. Kominers did
22 some math and showed a bunch of charts. Used his math to argue
23 that MetaBirkins are more akin to a digital brand than art
24 only. Again, I don't know that that matters to any of the
25 claims in the case. But even if it did, let's look at Dr.

1 Kominers's math and his charts.

2 Please put up slide 6, Ashley.

3 This is Dr. Kominers' market analysis chart. And if
4 you see up at the top, NeoTokyo Citizen, which is 111,000,
5 isn't shown. It's not shown because the number is too high.
6 It's kind of like the Russian judge and the figure skating to
7 throw out the data you don't like. And so we did this chart
8 with the full data. And when you see it with the full data,
9 MetaBirkins is much closer to the other group than the NeoTokyo
10 Citizens. Again, I'm not 100 percent what the chart is trying
11 to show, but that's the actual chart.

12 By the way, also you heard – and Mr. Warshavsky said
13 in his own closing today – that these things were sold in
14 Ether. And the price of Ether fluctuates against dollars. Dr.
15 Kominers did his chart in dollars. So we don't even know if it
16 accounts for the fluctuations in the price of Ether over time.
17 That's what the chart looks like.

18 So he did another chart. Again, I'm not 100 percent
19 sure what this chart is supposed to show, but I do know one
20 thing: Dr. Kominers threw out Mobland and threw out
21 X-Consoles, didn't put them on his chart. Russian judge.

22 Let's see what the chart looks like with that data.

23 With that data, MetaBirkins, down towards the bottom
24 of that chart.

25 And by the way, also on Dr. Kominers' chart he put

MintDisc above -- he put MetaBirkins above MintDisc. If you look at the data, MintDisc is above MetaBirkins, not that it matters. All right. That's the actual chart.

So let's take a look at another chart Dr. Kominers showed you. This is a chart that Hermès's counsel showed you in closing this morning. That's the chart Dr. Kominers showed you.

Now, what's interesting about this chart -- Ashley, if you could -- see that red box? We printed this chart out. We printed this chart out on eight and a half by 11 paper and measured it last night. That red box -- the whole chart is nine and a half inches. That red box is eight inches. That's less than one month. It's 23 days, maybe it's 24. December 3 to December 26. That's eight inches.

The next part, Ashley.

That little part now in blue or black, that's 11 months. That's 1.5 inches. Again, the chart is in dollars. Chart doesn't account -- we know -- Mr. Warshavsky just said that the price of Ether has declined from about 4500 to about -- at the time of the minting to about 1600 yesterday, when he looked on the internet. We know Ether fluctuated. We know this stuff was sold in Ether.

This chart is in dollars. It's no effort that I'm aware to account for changes in the price of Ether. And then this time scale was used to create whatever impression the

1 intent was.

2 And finally, Dr. Kominers put up this summary chart,
3 right. This chart Dr. Kominers was using to compare
4 MetaBirkins to the things you see on this page. But there's
5 something really interesting about the things you see on this
6 page. He put back in all the data he had excluded when he was
7 the Russian judge. NeoTokyo, that wasn't on his other chart.
8 It got excluded. Mobland, that wasn't on his other chart. It
9 got excluded. X-Console wasn't on his other chart, that got
10 excluded. But this chart, they included.

11 Now, what's left? MetaBirkins, a project that
12 involves Samsung and Sotheby's, a project that involves Nike
13 and a company Nike bought, and a project that involves
14 apparently Google. That's what's left. That's Dr. Kominers.

15 Now, there are two types of groups of consumers who
16 could be potentially confused in this case, right. And there's
17 potential confusions by handbag consumers and there's potential
18 confusion by NFT consumers. You heard a lot of testimony on it
19 this morning from Dr. Neal, not going to repeat, right.

20 But quickly, Dr. Isaacson conducted a survey aimed at
21 confusion among purchase of handbags. We heard that testimony.
22 And he found there was only 3.6 percent, percentage that was
23 too low to support a claim of confusion.

24 Can you put that transcript up?

25 This is from -- I can't see because of menu, but it's

1 transcript page, I think, 777. Sorry, just can't see it on my
2 screen.

3 He was asked: Have you ever formed an opinion -- this
4 is Dr. Isaacson was asked: Have you ever formed an opinion
5 about whether or not that 3.6 percent number from the handbags
6 survey reflected confusion amongst handbag purchasers?

7 Answer: I have expressed an opinion in this matter on
8 that 3.6 percent.

9 And what is that opinion, sir?

10 That number is below the number that would typically
11 be interpreted as indicating likelihood of confusion, 3.6
12 percent.

13 That's Dr. Isaacson's testimony.

14 Now, what's interesting is Dr. Isaacson didn't rely at
15 all on this number for his conclusions, he just tossed it out.
16 Russian judge.

17 And so can we put this back there?

18 There's no case here for confusion among handbag
19 consumers. Not a case. And you heard Dr. Neal talk about that
20 this morning, and you'll hear the judge.

21 So what does that leave us? Potential confusion by
22 purchasers of NFTs.

23 I want to get this very correct. The issue is whether
24 Mr. Rothschild's use of the Birkin name and/or the handbag's
25 distinct visual appearance is likely to confuse potential

1 consumers into thinking that the MetaBirkin NFTs are made and
2 sold or otherwise connected with, associated with, sponsored by
3 or approved by Hermès. And then, in determining this,
4 determining whether consumers are likely to be confused, you
5 may draw on your own common experience. You should take into
6 consideration the following factors.

7 I was reading that from the instructions.

8 Now, you heard Mr. Warshavsky go through these factors
9 at length. Factors are, of course, not the ultimate question
10 you are being asked to decide. The ultimate question you are
11 being asked to decide is whether, on balance, a likelihood of
12 confusion exists. That was a partial sentence, but you'll get
13 the whole sentence. Reading from the instructions.

14 So the factors are on a checklist; two factors for
15 Hermès, four factors for Rothschild, right. The question is,
16 on balance, whether a likelihood of confusion exists.

17 Now, one of the factors as to whether there's any
18 actual confusion by any actual purchasers of the bag. And we
19 would submit that this factor deserves substantial -- there's
20 no evidence in this case that any actual purchaser of an actual
21 MetaBirkin was confused. No purchaser, no evidence that any
22 purchaser of a MetaBirkin reached out to Mason Rothschild and
23 Discord or through the MetaBirkin's web page or anywhere else,
24 upset, angry, asking for their money back, saying, Hey, where's
25 my Birkin bag? There's simply none of that. And why would

1 there be? Because another factor on confusion is good faith,
2 especially intent. And this was discussed at length by
3 Mr. Millsaps. I'm not going to repeat it here.

4 But Mason Rothschild took every opportunity to
5 announce himself as the creator of the project, over 25,000
6 people on Discord he was speaking to. He was on Instagram
7 publicly, he was on Twitter, he was on the MetaBirkins website.
8 He never, ever publicly claimed once to be associated with
9 Hermès. The most he ever did was send some private text to
10 friends saying he was hoping to collaborate with Hermès, which
11 never happened. And Hermès belittles those attempts, because
12 they say, We don't know who Clement Quan is, or maybe you don't
13 really know the person at *Vogue*, or maybe you don't really have
14 a relationship with Sotheby's. They belittle the attempts.
15 Whatever. That's the only -- he did try. But the point is
16 those were private. They were never -- those are in private
17 texts.

18 In public, the only evidence is that Mason Rothschild
19 is proud of what he did and took credit for it. And when
20 Hermès complained and sent a cease and desist letter,
21 Mr. Rothschild put up a disclaimer on the website which you've
22 already seen. He and his publicist, Ken Loo, reach out to make
23 corrections, which you've heard. Why? Because he was proud of
24 his project and wanted credit for it. He wanted -- he wanted
25 to make some money from it, too. Hermès belittles that.

1 Something improper about making money. Like it's okay to spend
2 18 hours having a craftsman make a fancy handbag and sell
3 that -- those products for \$100 million a year just in the U.S.
4 alone, but it's not okay to make a MetaBirkin art project and
5 make money from that.

6 All right. So against this, what is the evidence of
7 likelihood of confusion? What evidence does Hermès offer?
8 Well, offers some questions from journalists. Questions from
9 journalists are not evidence of consumer confusion by potential
10 NFT purchasers. Journalists are paid to ask questions. That's
11 their job. They're not a good proxy for people of \$2500 or
12 more to spend for expensive NFTs or have a crypto wallet who
13 are interested in potentially buying a MetaBirkins.

14 And then they have some articles, they showed you some
15 articles; we saw them again today, right? Well, the articles
16 were corrected again. They are not evidence of confusion by
17 consumers. Maybe some evidence of some confusion by
18 journalists, right, which is corrected, right, which is all
19 evidence of Mason Rothschild's desire to take credit, right.

20 So we've got that. We've got a few newspaper articles
21 which are corrected. We've got a few journalist inquiries,
22 that's their job.

23 So what have we got left on confusion?

24 Well, we got the testimony of Dr. Isaacson, based on
25 his -- not the handbag people, those people are gone. We've

1 got the testimony of Dr. Isaacson based on his survey of
2 potential NFT purchasers. Dr. Neal talked about this survey at
3 length this morning and I am going to hit this very quickly,
4 okay.

5 But here's something interesting: The survey is based
6 on individuals who said in response to an online survey that
7 they would consider buying a \$2500 NFT in the next 12 months.
8 There's no work done by Dr. Isaacson to determine if any of
9 those folks actually bought an NFT for \$2500 or any other price
10 in the next 12 months. There's no work done by Dr. Isaacson to
11 check whether they ever bought an NFT. He has no knowledge if
12 they had a crypto wallet, if they owned any Ether. There's no
13 questions about whether these folks follow NFTs on Discord or
14 anywhere else.

15 What does he have? There's an online survey for folks
16 who say this is something they consider and they are willing to
17 do this in return for about 10 to 12 dollars in gift cards.
18 Since we've been talking about Starbucks this morning, that's
19 probably enough to buy about two cups of coffee at Starbucks.

20 And you may find that is not a representative sample
21 of folks who might mint a MetaBirkin NFT using a crypto wallet
22 paying in Ether. And that's important for two reasons:

23 First, you may find Dr. Isaacson didn't sample the
24 right group to begin with. Second, another factor you may
25 consider for likelihood of confusion is the sophistication of

1 the consumer. Because folks paying \$2500 for an NFT artwork,
2 paying a lot of money for anything, for that matter, are likely
3 to be going to pay attention, right, going to pay more
4 attention to buying a \$2500 item than if you're buying
5 something for a buck 50 off of the shelf at the Walmart.
6 That's probably right.

7 Then you heard Dr. Neal's testimony which I'm not
8 going to repeat here, that, well, Dr. Isaacson asked the right
9 question to weed out folks with this issue over feedback issue.
10 Dr. Isaacson then ignored the answer to his own question. Why
11 would Dr. Isaacson ignore the answer to his own question?
12 Didn't like the data. Russian judge. Just ignore it.

13 The combined effect of these flaws was to overstate
14 the amount of confusion from 18 percent or so to something
15 below ten percent. By the way, survey is just one factor,
16 right? But that is, that survey properly looked at is evidence
17 of a lack of confusion. The actual confusion was below ten
18 percent. And you heard Dr. Neal testify that below 15 percent,
19 15 percent, not ten percent, is generally considered not
20 sufficient to find confusion. Again, just one factor, and
21 that's assuming Dr. Isaacson even was surveying the right
22 folks.

23 So we believe -- not we believe, you may find there is
24 no likelihood of confusion in this case. Even if this were an
25 ordinary trademark case, without the First Amendment overlay,

1 given everything we have just discussed, the lack of any actual
2 confusion by any actual purchasers.

3 Mr. Rothschild's good faith and repeated efforts to
4 take credit and correct the record; the sophistication of the
5 purchasers, these are people spending a lot of money who need
6 to have a crypto wallet to do this; and all the issues Dr. Neal
7 discussed with Dr. Isaacson's survey. So there is no
8 confusion. Really, what more do we need than this?

9 Next issue is dilution, separate claim. In order to
10 prevail, Hermès must prove the Birkin mark is famous and was
11 famous before Mr. Rothschild first sold any of the MetaBirkin
12 NFTs. We don't dispute -- we don't dispute that the Birkin
13 mark is iconic among the wealthy. It is. That is different
14 than famous. Famous, and you will read, "famous" means widely
15 recognized by the general consuming public as designated Hermès
16 as the source of goods bearing the mark. General consuming
17 public, you may find, is not folks on Park Avenue carrying
18 Birkin bags; it's the general consuming public of the United
19 States, meaning folks all over the country, all income groups,
20 both men and women.

21 Ford Mustang is famous, widely recognized by the
22 general consuming public as coming from Ford. Coca-Cola is
23 famous, Nike is famous, Walmart is famous. There's plenty of
24 evidence in this case, which we don't dispute, of the Birkin
25 bag being featured in high-end fashion magazines like *Vogue* and

1 *Town & Country*, and being legendary among consumers of \$12,000
2 handbags. That is very different than evidence of the Birkin
3 bag being widely recognized by the general consuming public of
4 this country, like Coca-Cola.

5 Counsel for Hermès just stood up here not -- maybe not
6 half an hour ago, maybe a little more, and said Hermès only has
7 32 stores in the United States total.

8 The second thing Hermès would need to prove on this
9 dilution thing is that Mr. Rothschild's use of the MetaBirkins
10 name and the images associated with it are likely to dilute the
11 distinctiveness of the Birkin mark; that is, not that there is
12 an association, but that the association dilutes the
13 distinctiveness of the mark, that because of Mr. -- because of
14 Mr. Rothschild's MetaBirkins, the Birkin mark has less power in
15 identifying Birkin bags to the wealthy consumers who covet them
16 and can afford them.

17 Really?

18 Does that sound right to you?

19 As counsel showed you pictures of bees, all right.
20 Mr. Rothschild is not responsible for the other bees. He's not
21 responsible for somebody who's making a stone sculpture of the
22 Birkin bag. He's not responsible for being singing about the
23 Birkin bag in a rap song. Mr. Rothschild owns his conduct and
24 is responsible for his conduct.

25 Come to Hermès's third claim in this case, which is

1 for cybersquatting. This isn't a case where Hermès owns
2 hermès.com and someone goes out and squats on hermès.org,
3 demands a ransom. Judge Rakoff will tell you that bad faith is
4 one of the elements of cybersquatting that Hermès must prove.
5 There's no basis in this case to find Mr. Rothschild squatted
6 or squatted in bad faith on any web domain.

7 The uncontradicted evidence is Mr. Rothschild used
8 metabirkins.com only for the MetaBirkins project, and he never
9 attempted to sell the metabirkins.com site to anyone. There's
10 no evidence he attempted to hold the metabirkins.com website
11 name hostage or he attempted to divert customers from Hermès's
12 own website. The evidence is that Mr. Rothschild only used
13 metabirkins.com to sell the MetaBirkins he created. In so
14 doing, he acted in good faith. As my colleague covered, from
15 the start metabirkins.com website informed consumers that Mason
16 Rothschild was the creator. And after Hermès sent a cease and
17 desist, Mr. Rothschild put up a disclaimer. There's no claim
18 here for cybersquatting.

19 So we come to damages. It's our part of the case for
20 us. We hope you won't get to damages. We're asking you not to
21 get to damages. We're asking you to find Mr. Rothschild not
22 liable for trademark infringement, not liable for dilution or
23 cybersquatting, and to find his activities protected by the
24 First Amendment of the Constitution.

25 THE COURT: Thank you very much.

1 I'm sorry, were you --

2 MR. HARRIS: I have maybe -- I don't have a lot left.

3 THE COURT: No, no, go ahead. You have ten minutes
4 left.

5 MR. HARRIS: I am going to do --

6 THE COURT: I just misunderstood.

7 MR. HARRIS: Thank you, your Honor.

8 Don't want to miss the grand finale. Sorry.

9 But when you come to damages, there's the testimony of
10 Mr. Chavez, the head of Hermès in the United States.

11 Mr. Chavez testified that Birkin sales increased in 2021 and
12 '22. And he testified, here is the bottom Q: Are you aware of
13 loss of sales revenue in North America because of the
14 MetaBirkin?

15 No, I am not.

16 So Hermès, which has no damages, is asking instead for
17 the profits made by Mr. Rothschild. You heard he minted 100
18 Birkin bags at 1.1 Ether each and got a small piece of resales.
19 You heard he got paid in Ether, which the testimony is it's now
20 gone down in price. You heard that in total, the minting fees
21 amounted to about \$45,000, and about \$67,000 for resales.

22 Mr. Warshavsky, if you could do me a favor and put up
23 the chart you used from your expert, the damage chart. I think
24 it's the last chart you used.

25 You'll see the chart is from Dr. Mentzer. The minting

1 revenue is about \$45,000. That's converted from the Ether; the
2 Ether are worth less now. The royalties are about 69,000. We
3 talked about that. Artists, when they do NFTs, are able to get
4 a share of royalties going forward. That would be
5 Mr. Rothschild's share, it's about 17 and a half Ether,
6 \$69,000. Again, the price has gone down.

7 Then he comes to MetaBirkin NFT transfers. And what
8 is that? Well, that is that Mr. Mentzer took the position that
9 because Mr. Rothschild kept three MetaBirkins out of the first
10 100 that were minted, that the damage there is \$120,000 based
11 on the highest price of MetaBirkin ever traded for. I don't
12 really understand. But the testimony is that Mr. Rothschild
13 gave away two of those MetaBirkins, and he only has one.
14 There's no evidence in this case that he intends to sell it or
15 that he could sell it for \$40,000 right now.

16 So that's the damages. I'd ask you to disregard
17 Mr. Mentzer's \$120,000, and to bear in mind the price of Ether
18 has gone down.

19 Now, again, there was no harm to -- of course, we're
20 going to ask you not to find liability and no damages.

21 Again, there was no harm to Hermès, so why? You may
22 find Hermès didn't like Mr. Rothschild's art; that Hermès
23 judged Mason Rothschild and his art and found him wanton.
24 Maybe that Hermès 150-year-old French fashion house thinks it's
25 better than Mason Rothschild, the self-made artist with no

1 formal art school training. And upset that a 27-year-old -- now
2 28-year-old -- from L.A., who Hermès had never heard of, did
3 this.

4 We heard some interesting things in this case that
5 speak to Hermès's attitude.

6 Hermès's counsel showed you in opening and then showed
7 you again today and showed Mr. Rothschild a lot of texts, but
8 didn't ask for a lot of explanation, which is his right. We
9 provided that explanation. You might remember the -- was shown
10 today in closing, the Future tech, the Future posting. That's
11 a post that Future made about the MetaBirkins, rap star. And
12 Mr. Rothschild put on -- can you put that up, Ashley? And
13 Mr. Rothschild put up on that -- okay, I'll just keep going.
14 Don't worry about it. I'll keep going. They'll remember.

15 Mr. Rothschild -- there it is -- put up on it
16 MetaBirkins2Pluto. And Dr. Kominers got up there and said,
17 Well, that means the price going to the moon. Didn't bother to
18 find out that Mr. Rothschild knows Future, and that that is
19 Future's nickname. It's an interesting thing that a man named
20 Future has a nickname. Okay. Another nickname.

21 All right. So then it happens again. They put up --
22 if you could throw up, please, Ashley, Exhibit -- the one I
23 handed to you before, it's Exhibit 313.

24 Mr. Rothschild, on direct, was examined by this,
25 leaving the impression that when it was minted, it said "secure

1 the bag." We had to bring out on cross, you can very clearly
2 see it says "press the button below to mint your MetaBirkin
3 now." So that's just a couple of examples, all right.

4 Now, Mr. Martin, the general counsel of Oliver Mezz,
5 who's been sitting here the whole trial, testified on direct,
6 questions by his lawyer, that Hermès had no contact, no
7 contact, his words, with Mason Rothschild after sending the
8 cease and desist.

9 On cross, Mr. Martin had to correct that. Because, in
10 fact, Mason Rothschild was respectful and his attorneys reached
11 out to Hermès's attorneys right away. And then Mr. Rothschild
12 put a disclaimer on his website. And he went on Discord and
13 told all those tens of thousands of people that he wasn't
14 affiliated with Hermès in any way, shape or form; this was his
15 project. And then Hermès sued Mr. Rothschild anyway. And then
16 even though Hermès could have sent the complaint to his lawyers
17 with whom they were in contact, Hermès chose to serve
18 Mr. Rothschild at his store showing pictures to his customers.
19 That's a lack of respect.

20 Mason Rothschild came from a good family, but he came
21 from nothing. He made himself. Designs now for Formula I. He
22 did not -- he owns a boutique in Los Angeles with his fiancé.
23 He made himself an artist. Mason Rothschild wasn't given
24 anything. He started working at 16. You saw our testimony
25 about how hard he's worked.

1 Hermès wants more than what they are entitled to here.
2 They want more than what the law gives them. The law gives
3 Hermès the ability in certain circumstances to enforce their
4 trademark in the commercial market and to prevent consumer
5 confusion.

6 Here, there is no confusion. There is no dilution.
7 There is no cybersquatting. There is no valid claim. And
8 Hermès still wants more. They want control over how Mason
9 Rothschild makes a point or creates pictures. And that is
10 protected by the First Amendment of our Constitution; that is
11 protected by you. Thank you.

12 THE COURT: Thank you very much.

13 Ladies and gentlemen, so we'll give you your lunch
14 break now and we'll get some medicine for our court reporter.
15 And we'll see you at 10 after 2.

16 (Jury not present)

17 THE COURT: Just work out over the lunch break, as I
18 indicated, any remaining problems on the index of the exhibits
19 and the exhibits themselves. But if there still is an issue,
20 I'll take it up when we get back at 10 after 2.

21 See you then.

22 (Luncheon recess)

23 (Continued on next page)
24
25